STATE OF MICHIGAN

COURT OF APPEALS

CVETKO ZDRAVKOVSKI, a/k/a STEVE ZDRAVKOVSKI, and TATIJANA ZDRAVKOVSKI,

Plaintiffs/Counter-Defendants-Appellees,

v

GAN GONY, INC., and RANDA KANDALAFT,

Defendants,

and

ANTOINE KANDALAFT,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
September 20, 2007

No. 270203
Wayne Circuit Court
LC No. 01-119364-CH

CVETKO ZDRAVKOVSKI, a/k/a STEVE ZDRAVKOVSKI, and TATIJANA ZDRAVKOVSKI,

Plaintiffs/Counter-Defendants-Appellants,

v

GAN GONY, INC., and RANDA KANDALAFT,

Defendants,

and

ANTOINE KANDALAFT,

Defendant/Counter-Plaintiff-Appellee,

No. 270429
Wayne Circuit Court
LC No. 01-119364-CH

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

This case involves a property dispute over an approximate 3.7-foot strip of land that is part of lot 1106, a lot owned by plaintiffs, on which a portion of defendants' building is situated. In a prior appeal, this Court reversed orders granting defendants' motion for summary disposition under MCR 2.116(C)(10), determined that defendants' building encroached on plaintiffs' property, and remanded for a determination of the proper remedy for the encroachment. See *Zdravkovski v Gan Gony, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 13, 2004 (Docket No. 246392). On April 28, 2006, following a hearing on a date scheduled for a settlement conference, the trial court entered a judgment awarding plaintiffs monetary damages of $5,000 for the encroachment. Plaintiffs and defendant Antoine Kandalaft now each appeal as of right. We vacate the trial court's judgment and remand for further proceedings regarding the appropriate remedy for the encroachment.

I. Dkt. No. 270203

We first consider Kandalaft's pro se challenge to the amount of monetary damages awarded to plaintiffs.[1] In considering Kandalaft's claim of error, the material question is whether it was proper for the trial court to determine the amount of plaintiffs' monetary damages at the hearing scheduled for a settlement conference.[2]

Where, as in this case, a case is partially resolved pursuant to MCR 2.116(C)(10), a trial court may ascertain what material facts are without substantial controversy, including the extent to which damages are not disputed, by examining the evidence and questioning the attorneys. MCR 2.116(J)(1)(b). Under proper circumstances, a trial court may also order an immediate trial to resolve disputed issues of fact. MCR 2.116(I)(3). In general, a plaintiff in a tort action must prove damages with reasonable certainty. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). Damages in tort may be based on approximation, but there must be a reasonable basis for the computation. *Id.*

We review a trial court's factual findings for clear error. MCR 2.613(C); *Blackhawk Dev Corp, supra* at 40. Conclusions of law, including whether a party was entitled to summary disposition, are reviewed de novo. *Id.* at 40; *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition under MCR 2.116(C)(10) is a proper means of testing whether

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[1] We decline to consider Kandalaft's claim that plaintiffs are not the rightful owners of the disputed property. Pursuant to the law of the case doctrine, this Court's prior decision that the building encroached on plaintiffs' property is controlling. *Freeman v DEC, Int'l, Inc*, 212 Mich App 34, 37-38; 536 NW2d 815 (1995).

[2] We assume, for purposes of considering this issue, that the trial court properly rejected an injunctive remedy.

there is a genuine issue of material fact, but such a motion must be based on substantively admissible evidence. MCR 2.116(G)(6); *Maiden, supra* at 120.

The record indicates that the trial court sua sponte decided that it was "granting summary disposition for costs purposes" after plaintiffs' counsel failed to appear at the time scheduled for the settlement conference. After asking Kandalaft and plaintiff Cvetko Zdravkovski (neither of whom were under oath) for their respective positions regarding the current market value of the disputed property, being advised by Kandalaft of the result of an earlier case evaluation, and indicating that it was familiar with the facts of the case, the trial court assigned a value of $5,000 as the "market value" of the property in question, specifically indicating in its judgment that this amount "represents two Mediation evaluations."

Because the parties disputed the value of the disputed property, the trial court improperly made a finding of fact under the guise of determining that there was no genuine issue of material fact. *Mahaffey v Attorney Gen*, 222 Mich App 325, 343; 564 NW2d 104 (1997). Additionally, there is no indication that plaintiffs were afforded an opportunity to present substantively admissible evidence in support of their claim of damages. Quite simply, the trial court erred in determining the amount of damages based on the parties' oral representations at what was to be a settlement conference, and without affording the parties the opportunity to present witnesses and documentary evidence as to the value of the property.

The trial court also erred in considering the case evaluation award that was improperly disclosed by Kandalaft at the settlement conference. If a trial court is acting as a fact-finder, parties may not reveal the case evaluation amount until after the judge has rendered judgment. MCR 2.403(N)(4); *Schell v Baker Furniture Co*, 232 Mich App 470, 479-480; 591 NW2d 349 (1998), aff'd on other grounds 461 Mich 502 (2000). The case evaluation should not have any effect on the trial court's resolution of the merits of the case, *id.* at 480, yet in this case the judgment itself states the amount of both mediation awards, and is based in part on those awards. Therefore, we vacate the April 28, 2006, judgment and remand for further proceedings.[3]

Plaintiffs and Kandalaft both indicate on appeal that the trial court intended that monetary damages be conditioned on one or more defendants receiving ownership of part of lot 1106. While there is some indication in the record that the trial court intended to fashion a "sales" remedy for the encroachment, the judgment itself only purports to award monetary damages to plaintiffs in connection with the east 3.7 feet by 100 feet of lot 1106. The trial court did not issue a declaratory ruling affecting the legal title to lot 1106, or an order requiring that plaintiffs convey legal title to any defendant. As entered, the trial court's judgment does not affect

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[3] Although Kandalaft also argues that the trial court erroneously signed an order dated March 22, 2006, this issue is insufficiently briefed for appellate consideration. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). In any event, there is no indication in the record that the court signed a March 22, 2006, order. Assuming that Kandalaft's argument is predicated on the April 20, 2006, judgment that the court clerk certified as a true copy, our resolution of Kandalaft's challenge to the April 28, 2006, judgment is dispositive of this claim, because both documents essentially contain the same award of damages.

plaintiffs' legal title to the disputed property. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977) (A court speaks through its orders and judgments, not its oral pronouncements or written opinions).[4]

The trial court was bound to follow this Court's determination that plaintiffs are the rightful owners of the property. *In re TM (After Remand)*, 245 Mich App 181, 191; 628 NW2d 570 (2001). To the extent that a transfer of title would nonetheless be within the trial court's equitable powers in fashioning an appropriate remedy for the encroachment, we give consideration and weight to the trial court's conclusions, but our review of this equitable matter is de novo. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005); *Cantieny v Friebe*, 341 Mich 143, 146; 67 NW2d 102 (1954). We conclude that it would be inequitable to grant Kandalaft or any other defendant the affirmative relief of legal title as a condition of awarding damages to plaintiffs for the harm caused by the tortious encroachment on plaintiffs' property. A party seeking the aid of a court of equity must come in with clean hands. *Stacknik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975).

II. Dkt. No. 270429

A remand is also warranted in connection with plaintiffs' appeal challenging the trial court's April 28, 2006, judgment.[5]

Although plaintiffs argue that relief in the form of rental payments was an appropriate method of compensating them for the permanent injury to their property, the existing record does not support this claim. Further, plaintiffs have not demonstrated any basis for consequential or special damages, in the form of lost rental income, caused by the encroachment. *Kratze*, *supra* at 148-151. As indicated in *Kratze v Independent Order of Oddfellows*, 190 Mich App 38, 47-48; 475 NW2d 405 (1991), rev'd in part on other grounds 442 Mich at 136 (1993), damages for lost use may include a reasonable rent where the encroachment causes injury to rental and lost profits. But because we are remanding this case for further proceedings on damages, plaintiffs

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[4] We note that damages in an encroachment case are not intended to force a "sale," but rather to compensate the plaintiff for the injury. *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 149; 500 NW2d 115 (1993). A court may use whatever method is most appropriate to compensate a plaintiff for the loss, but where an encroachment injury is permanent, an appropriate measure of damages is the "diminution in value of the property itself as represented by the value of the property without the encroachment, minus the value of the property with the encroachment, or alternatively, the value of the strip of land on which the building sits." *Id.* at 149-150.

[5] We reject Kandalaft's claim that plaintiffs may not challenge the trial court's earlier refusal to grant an injunctive remedy and order removal of the portion of the building situated on lot 1106. Although the trial court orally denied plaintiffs' request for injunctive relief on August 26, 2005, it did not enter a remedial judgment or order until April 2006. A court speaks through its orders and judgments. *Tiedman*, *supra* at 576. In any event, having filed an appeal from the final judgment, plaintiffs were free to raise on appeal issues related to the earlier proceeding. See *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

are free to offer evidence of an appropriate measure of general damages and to establish special damages that were properly pleaded. *Kratze, supra* at 148-149.

With regard to the propriety of an injunctive remedy, plaintiffs appropriately rely on *Kratze*, but plaintiffs' request for such a remedy is premature. Unlike in *Kratze*, this case did not involve a remedial decision made following a bench trial. Here, the trial court determined the remedy for the encroachment without any evidentiary hearing on the matter. Further, although plaintiffs moved for an injunctive remedy that would include removal of the encroachment, the parties did not offer substantively admissible evidence demonstrating that there was no genuine issue of material fact regarding the various factors a court should consider in determining whether to grant injunctive relief.

To the extent that plaintiffs argue that the trial court failed to consider relevant factors when denying their request for injunctive relief, we agree. In general, "the court will balance the benefit of an injunction against the inconvenience and damage to defendant, and grant an injunction or award damages as seems most consistent with justice and equity under all the circumstances of the case." *Kratze, supra*, 442 Mich at 143 n 7, quoting *Hasselbring v Koepke*, 263 Mich 466, 480; 248 NW 869 (1933). Relevant factors in determining the propriety of an injunction against a tort include:

> (a) The nature of the interest to be protected,
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> (b) The relative adequacy to the plaintiff of injunction and of other remedies,
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> (c) Any unreasonable delay by the plaintiff in bringing suit,
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> (d) Any related misconduct on the part of the plaintiff,
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> (e) The relative hardship likely to result to defendant if an injunction is granted and to the plaintiff if it is denied,
>
> (f) The interests of third persons and of the public, and
>
> (g) The practicability of framing and enforcing the order or judgment. [*Kratze, supra*, 442 Mich at 142 n 6, quoting 4 Restatement Torts, 2d, § 936, pp 565-566.]

A trial court may, but is not bound to, balance the relative hardships and equities, if an encroachment is an intentional and willful act. *Kernen v Homestead Dev Co*, 232 Mich App 503, 514; 591 NW2d 369 (1998); see also *Kratze, supra*, 442 Mich at 145. The two central considerations guiding the court are "[a]n interest in avoiding judicial approval of private eminent domain by the encroacher, and an interest in preventing extortion by the encroachee, who may use the injunction to 'compromise' the claim." *Id.* at 143. The trial court must exercise discretion in determining whether to grant injunctive relief. See *Holly Twp v Dep't of Natural Resources*, 440 Mich 891; 487 NW2d 753 (1992), and *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 534; 609 NW2d 574 (2000).

Here, the record indicates that the trial court refused to consider an injunctive remedy based on its conclusion that it would not constitute an efficient use of economic resources for any party, except plaintiffs. The harshness of injunctive relief to the defendant is not dispositive of whether it should be ordered. *Schadewald v Brule*, 225 Mich App 26, 40 n 3; 570 NW2d 788 (1997). As indicated in *Stock v Jefferson Twp*, 114 Mich 357, 360; 72 NW 132 (1897), "[i]t does not appeal to one's sense of justice to say that the exercise of a right possessed is not of as much benefit to the possessor as the taking of that right from the owner would be to the trespasser, and therefore the trespasser should be allowed to continue his trespass." The trial court's decision does not indicate that it considered other appropriate factors when denying injunctive relief, or otherwise conducted a principled analysis of the appropriateness of an injunction. Without further factual development and consideration of the balancing test in *Kratze, supra*, 442 Mich at 142-143 n 6, it was an abuse of discretion for the trial court to deny injunctive relief. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Therefore, we remand this case for a trial regarding the appropriateness of injunctive relief or other remedies, including damages, if any, that plaintiffs can prove were caused by the encroachment.[6]

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray

[6] Pursuant to MCR 2.116(J)(1)(b), the court may ascertain what material facts are without substantial controversy, including the extent to which damages are not disputed.